

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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NICOLE R. LEAL,

Plaintiff,

v.

MICHELLE FERRINI, et al.,

Defendants.

Case No. 2:14-cv-01524-APG-PAL

ORDER

(Various Mtns – Dkt. ##1-9 & 11)

Plaintiff Nicole R. Leal is proceeding in this action pro se. She has requested authority pursuant to 28 U.S.C. § 1915 to proceed in forma pauperis and submitted a complaint. This matter was referred to the undersigned pursuant to the provisions of 28 U.S.C. § 636(b)(1)(A) and (B) and Local Rules IB 1-3 and 1-4.

**I. In Forma Pauperis Application (Dkt. #1).**

Plaintiff has submitted the affidavit required by § 1915(a) showing that she is unable to prepay fees and costs or give security for them. Accordingly, her request to proceed in forma pauperis will be granted pursuant to 28 U.S.C. § 1915(a). The court will now review Plaintiff's complaint.

**II. Screening the Complaint**

Upon granting a request to proceed in forma pauperis, a court must additionally screen a complaint pursuant to § 1915(a). Federal courts are given the authority dismiss a case if the action is legally "frivolous or malicious," fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). When a court dismisses a complaint under § 1915(a), the plaintiff should be given leave to amend the complaint with directions as to curing its deficiencies, unless it is clear from the face of the

1 complaint that the deficiencies could not be cured by amendment. *See Cato v. United States*, 70  
2 F.3d 1103, 1106 (9th Cir. 1995).

3 Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a complaint  
4 for failure to state a claim upon which relief can be granted. Review under Rule 12(b)(6) is  
5 essentially a ruling on a question of law. *See Chappel v. Laboratory Corp. of America*, 232 F.3d  
6 719, 723 (9th Cir. 2000). A properly pled complaint must provide a short and plain statement of  
7 the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp.*  
8 *v. Twombly*, 550 U.S. 544, 555 (2007). Although Rule 8 does not require detailed factual  
9 allegations, it demands “more than labels and conclusions” or a “formulaic recitation of the  
10 elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Papasan v.*  
11 *Allain*, 478 U.S. 265, 286 (1986)). The court must accept as true all well-pled factual allegations  
12 contained in the complaint, but the same requirement does not apply to legal conclusions. *Id.*  
13 Mere recitals of the elements of a cause of action, supported only by conclusory allegations, do  
14 not suffice. *Id.* at 679-80. Secondly, where the claims in the complaint have not crossed the line  
15 from plausible to conceivable, the complaint should be dismissed. *Twombly*, 550 U.S. at 570.

16 The complaint was filed on the court’s form civil rights complaint pursuant to 42 U.S.C. §  
17 1983. To state a claim under section 1983, a plaintiff must allege that a right secured by the  
18 Constitution has been violated, and the deprivation was committed by a person acting under color  
19 of state law. *West v. Atkins*, 487 U.S. 42 (1988) (citation omitted). States and state officers sued  
20 in their official capacity are not “persons” for the purposes of a section 1983 action, and generally,  
21 they may not be sued under the statute. *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71 (1989).  
22 Section 1983 does allow suits against state officers in their individual capacities. *Hafer v. Melo*,  
23 502 U.S. 21, 26 (1991). Plaintiff’s complaint names her former landlord, Michelle Ferrini, and  
24 Mark Aliano, the owner of a company called Granite City & Marble, located in Stoughton,  
25 Massachusetts. Plaintiff has not alleged either of these people are state actors, and she cannot state  
26 a claim under 42 U.S.C. § 1983 against them.

27 The complaint alleges that Plaintiff currently resides in Las Vegas, Nevada. She moved  
28 out of her former residence, 976 Douglas Avenue in Providence, Rhode Island, on July 19, 2014.

1 She asserts claims of fraud, mail fraud, breach of contract, and negligence against Ferrini and  
2 Aliano and seeks damages in the amount of \$80,000.00 for “emotional distress, financial  
3 difficulties.” She claims that her landlord, Michelle Ferrini, picked up her mail from her Douglas  
4 Avenue address and has not mailed an unspecified “government-issued check” to Plaintiff at her  
5 residence in Las Vegas, Nevada. Ferrini has also not mailed Plaintiff her \$750.00 security deposit.  
6 Plaintiff signed a leasing agreement that her \$750.00 security deposit would be refunded thirty  
7 days after her move out date, but she has not yet received it.

8 As an initial matter, Plaintiff has not alleged any facts at all to support a claim against  
9 Defendant Aliano or Granite City & Marble. She alleges only that Aliano owns Granite City &  
10 Marble, and that Michelle Ferrini collected Plaintiff’s rent on behalf of the company. As Plaintiff  
11 has not alleged any facts to support a claim against Aliano and Granite City & Marble, Plaintiff’s  
12 claims against them will be dismissed with leave to amend. For reasons discussed below, the court  
13 doubts that Plaintiff will be able to establish that this court has personal jurisdiction over the  
14 Defendants, or subject matter jurisdiction over this case.

15 With respect to Ferrini, Plaintiff has not alleged any facts to support this court’s personal  
16 jurisdiction over Ferrini, or subject matter jurisdiction over Plaintiff’s complaints against her.  
17 Federal courts are courts of limited jurisdiction and possess only that power authorized by the  
18 Constitution and statute. *See Rasul v. Bush*, 542 U.S. 466, 489 (2004). Plaintiff’s complaint asserts  
19 claims for mail fraud, breach of contract, and negligence. Mail fraud is a federal crime prohibited  
20 by 18 U.S.C. § 1341. As a general rule, there is no private right of action under title 18 of the  
21 United States Code. *See Dyson v. Utigard*, 163 F.3d 607, 607 (9th Cir. 1998); *Aldabe v. Aldabe*,  
22 616 F.2d 1089, 1092 (9th Cir. 1980) (no basis for civil liability under Title 18). In plain English,  
23 this means that a plaintiff may not sue defendants for violation of the mail fraud statute.

24 Plaintiff’s other two claims for breach of contract and negligence are not federal claims.  
25 Plaintiff’s complaint does not establish that the court has federal question jurisdiction pursuant to  
26 28 U.S.C. § 1331.

27 Plaintiff may be filing this case in federal court because she believes she can invoke the  
28 court’s diversity jurisdiction under 28 U.S.C. § 1332 because she now resides in Nevada, Ferrini

1 resides in Rhode Island, Aliano and Granite City & Marble reside in Massachusetts and she seeks  
2 damages of \$80,000.00.

3 To file a lawsuit in federal court asserting state claims against Defendants based on  
4 diversity Plaintiff must establish that the amount in controversy exceeds \$75,000. Plaintiff's  
5 request for \$80,000.00 damages is conclusory and not supported by the facts alleged in the  
6 complaint. Plaintiff asserts that Ferrini failed to refund a \$750.00 security deposit and a  
7 "government-issued check" in an unspecified amount. Although normally, the court defers to the  
8 statement of damages in a complaint, it has an "independent obligation to examine its jurisdiction  
9 where doubts arise." *See Surber v. Reliance Nat. Indem. Co.*, 110 F. Supp. 2d 1227, 1231 (N.D.  
10 Cal. 2000) (internal citation and marks omitted). Plaintiff's conclusory allegation that she suffered  
11 \$80,000.00 in damages for her failure to receive the \$750.00 refund and a "government-issued  
12 check" in an unspecified amount does not establish this court has subject matter jurisdiction based  
13 on diversity.

14 Plaintiff has also not established that this court has personal jurisdiction over the  
15 Defendants who are residents of Rhode Island and Massachusetts. This court's jurisdiction to  
16 resolve a case on its merits requires a showing that the Plaintiff has both subject matter and  
17 personal jurisdiction. *Ruhrgas AG v. Marathon Oil Co*, 526 U.S. 574, 577 (1999). Personal  
18 jurisdiction represents a restriction on judicial power which is based on principles of individual  
19 liberty. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 634, 702  
20 (1982). There are two types of personal jurisdiction: general and specific. When a state exercises  
21 personal jurisdiction over a defendant in an action not arising out of, or related to, the defendant's  
22 contact with the forum, the state is said to exercise "general jurisdiction" over the defendant.  
23 *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 n.9 (1984). A finding of  
24 general jurisdiction allows a defendant to be haled into court in the forum state to defend any of  
25 its activities anywhere in the world. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797,  
26 801 (9th Cir. 2004). Specific jurisdiction is more limited. Plaintiff does not allege any facts which  
27 would show that the Defendants have any contacts with the state of Nevada or have done any type

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1 of business here such that they may be subject to personal jurisdiction in Nevada. Just because  
 2 Plaintiff lives here does not mean she can sue out-of-state Defendants in federal court in Nevada.

3 The standard for establishing general jurisdiction is “fairly high” and requires a showing  
 4 that the defendant’s contacts with the state are sufficient to approximate physical presence.  
 5 *Bangcroft & Masters, Inc. v. Agusta National, Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000).  
 6 Generally, a plaintiff must show that a non-resident defendant’s activities in the forum state are  
 7 “continuous and systematic.” *Helicopteros*, 466 U.S. at 415. Plaintiff has alleged no facts to  
 8 support a showing that the Defendants’ contacts with the State of Nevada are continuous and  
 9 systematic and approximate their physical presence in the State of Nevada.

10 Plaintiff’s complaint also does not meet the three-part test for establishing specific personal  
 11 jurisdiction over the Defendants in this case. Defendants who live or operate primarily outside of  
 12 a state have a due process right not to be subjected to judgment in out-of-state courts. The Ninth  
 13 Circuit applies a three-part test to determine whether the exercise of specific jurisdiction over a  
 14 non-resident defendant is appropriate. *Boschetto v. Hansing*, 539 F.3d 1011, 1016 (9th Cir. 2008).  
 15 Specific jurisdiction may be exercised if:

- 16 1. The non-resident defendant purposely directs its activities or consummates some  
 17 transaction within the forum, or with the resident of the forum; or performs some act  
 18 which purposely avails itself of the privilege of conducting activities in the forum,  
 19 thereby invoking the benefits and protections of the laws of the forum;
- 20 2. The claim arises out of or relates to the Defendant’s forum-related activities; and
- 21 3. The exercise of jurisdiction comports with fair play and substantial justice, *i.e.*, is  
 22 reasonable.

23 *Id.*

24 In this case, the Plaintiff complains that her Rhode Island landlord did not refund a \$750.00  
 25 security deposit for a residence she leased in Rhode Island, and also failed to forward a  
 26 “government-issued check” in an unspecified amount to her after she relocated to Nevada. For the  
 27 reasons this order explains, it does not appear that Plaintiff can establish that this court has either  
 28 personal jurisdiction over the Defendants or subject-matter jurisdiction over Plaintiff’s claims. As

1 stated, it does not appear that Plaintiff has any federal claim. She is attempting to assert state  
 2 claims against non-resident Defendants who failed to refund a security deposit and/or forward a  
 3 check to her. However, the court will afford Plaintiff an opportunity to file an amended complaint  
 4 if she believes she can establish a basis for this court's subject matter jurisdiction and personal  
 5 jurisdiction over the Defendants.

6 If Plaintiff elects to proceed in this action by filing an amended complaint, she should  
 7 specifically identify each Defendant to the best of her ability, support each claim with factual  
 8 allegations about each Defendants' actions, and state the basis for this court's subject matter  
 9 jurisdiction and personal jurisdiction over each Defendant. Plaintiff's claims must be set forth in  
 10 short and plain terms, simply, concisely and directly. *See Swierkeiewicz v. Sorema N.A.*, 534 U.S.  
 11 506, 514 (2002); Fed. R. Civ. P. 8.

12 Plaintiff is also informed that the court cannot refer to a prior pleading in order to make an  
 13 amended complaint complete. Local Rule 15-1 requires that an amended complaint be complete  
 14 in itself without reference to any prior pleading. This is because, as a general rule, an amended  
 15 complaint supersedes the original complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967).  
 16 Once plaintiff files an amended complaint, the original pleading no longer serves any function in  
 17 the case. Therefore, in an amended complaint, as in an original complaint, each claim and the  
 18 involvement of each defendant must be sufficiently alleged.

19 For all of these reasons,

20 **IT IS ORDERED:**

- 21 1. Plaintiff's request to proceed in forma pauperis is GRANTED. Plaintiff shall not  
 22 be required to pay the filing fee of four hundred dollars.
- 23 2. Plaintiff is permitted to maintain this action to conclusion without the necessity of  
 24 prepayment of any additional fees or costs or the giving of a security therefor. This  
 25 Order granting leave to proceed in forma pauperis shall not extend to the issuance  
 26 of subpoenas at government expense.
- 27 . Plaintiff shall have until **January 30, 2014**, to file an amended complaint, if she  
 28 believes she can correct the noted deficiencies. The amended complaint must be a


1 complete document in and of itself, and will supersede the original complaint in its  
2 entirety. Any allegations, parties, or requests for relief from prior papers that are  
3 not carried forward in the amended complaint will no longer be before the court.

4 . Plaintiff shall clearly title the amended complaint as such by placing the words  
5 “FIRST AMENDED COMPLAINT,” along with the case number, **2:14-cv-01524-**  
6 **APG-PAL** on page 1 in the caption.

7 3. Plaintiff is expressly cautioned that if she does not timely file an amended  
8 complaint in compliance with this order, this case may be immediately dismissed.

9 4. Plaintiff’s various Motions (Dkt. ##2-9 & 11) are DENIED WITHOUT  
10 PREJUDICE. If Plaintiff files an amended complaint that states a claim upon  
11 which relief can be granted, Plaintiff may refile them at the appropriate time.

12 Dated this 31st day of December, 2014.

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16 PEGGY A. LEEN  
17 UNITED STATES MAGISTRATE JUDGE  
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